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JOHN P. FARQUHAR, et al.,
Petitioners,

vs.

CITY OF MANHATTAN BEACH, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

PETITIONERS' REPLY BRIEF

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1. THE OPPOSITION DOES NOT AND CANNOT CONTEST THE FACT THAT THE PENCIL THIN 4-3 DECISION OF THE CALIFORNIA COURT ALLOWED THE CITY TO ACQUIRE THE SUBJECT PROPERTY FOR $3.4 MILLION LESS THAN THE CITY'S OWN FAIR MARKET APPRAISAL.

The opposition brief does not dispute the motive. The City of Manhattan Beach wanted this property for a park. The railroad wanted money. In 1985, the City appraised the piece it wanted at $8.4 million. In 1986, the railroad offered to quitclaim the property to the City in return for consideration valued at $5 million. The railroad could not get title insurance despite paying $45,000 in trying. The City knew that. It agreed to "work" with the railroad, nonetheless. The two agreed together to sit on the property for five years and then to file a quiet title action based on adverse possession.

It was only after petitioners came forward well before the five years ran, that the City and the railroad suddenly came up with their quitclaim argument. Before that (as discussed at pp. 8, 9 and 24 of the Petition for Certiorari), both the City and the railroad had consistently described the railroad's interest as a mere easement which would terminate upon abandonment.

None of these facts are disputed in the opposition brief.

Therefore, the issue in this case is whether the California Supreme Court has the power to rewrite

history and over a century of railroad right of way law in order to help the City complete the deal it made with the railroad without paying just compensation to the rightful owners of the property.

2. THE OPPOSITION MISLEADS THE COURT IN REGARD TO THE RAISING OF THE INVERSE CONDEMNATION ISSUE. THE TRIAL COURT AND THE COURT OF APPEAL RULED IN PETITIONERS' FAVOR ON THE ISSUE AND ALL THREE DISSENTING MEMBERS OF THE CALIFORNIA SUPREME COURT ADDRESSED IT. THE ISSUE WAS BRIEFED, DECIDED AND IS PROPERLY BEFORE THIS COURT.

The opposition contends that this case never involved any issues of constitutional law.

However, the trial court ruled that both the City and the railroad had inversely condemned petitioners' property. (Petitioners' App. E8-E10.) The Court of Appeal unanimously upheld that ruling. (Petitioners' App. C14-C16). Three dissenting members of the California Supreme Court wrote on the inverse condemnation issue. One (Justice Mosk) was of the opinion that only the City could be held liable in inverse condemnation. The remaining two (Justice Kennard and Justice Werdegar) were of the view that both the City and Santa Fe could be held liable in inverse condemnation. If the issue was never raised, why was it decided?

The operative Fourth Amended Complaint filed by Petitioners alleged a Second Cause of Action in Inverse Condemnation which stated:

> "(D)efendants were aware that Santa Fe did not have fee title to the subject property at the time of the transfer of its asserted interests in the subject property to the City of Manhattan Beach and . . . defendants did not have the right to possession or use of the subject property after its abandonment by Santa Fe. This physical taking of the subject property for public purposes without just compensation is in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, section 19 of the California Constitution." (Fourth Amended Complaint, ¶14, emphasis added.)

The inverse condemnation issue was also before the California Supreme Court although its four man majority ultimately sidestepped it.

Respondents attach, as appendix 4 to their opposition, the table of authorities from one of Petitioners' Briefs on the Merits to show that no federal issues were discussed and only one federal case was cited. However, Respondents ignore the fact that a separate brief on inverse condemnation issues was filed in Opposition to Petitioner Santa Fe. It stated:

> "To avoid duplication, the title issues are addressed in (the Brief on the Merits in Opposition to (Respondent) City of Manhattan Beach). That discussion is incorporated by reference in this brief. (Cal. Rules of Court, rule 14(a).) Santa Fe has also raised inverse condemnation issues in point IV(C) of its Brief that are not raised by the City. These remaining issues are addressed below." (Brief On The Merits In Opposition To Santa Fe, p. 1.)

That second brief directly addressed the inverse condemnation liability of Santa Fe and the City, as follows:

> "The City and Santa Fe jointly took (Petitioners') property through permanent physical occupation. They have denied (Petitioners') ownership, and have denied Real Parties any physical use of the property. The United States Supreme Court 'has almost invariably found that the permanent physical occupation of property constitutes a taking.' (Citing this Court's *Keystone* and *Loretto* cases). In cases where condemnors physically occupy property, the affected landowners have a categorical right to just compensation no matter how minute the physical intrusion and no matter how weighty the governmental or public interests furthered by the taking. (Citing this Court's *Lucas*

decision.)" (Brief On The Merits In Opposition To Santa Fe, p. 6-7.)

Respondent City appealed to the court to take the easy way out and ignore the inverse condemnation issues, by stating in its brief that:

> "If this Court agrees with the City that the 1888 deed conveyed fee simple title to the railroad, then further analysis is not needed." (City's Brief on the Merits, p. 32.)

The title issue was decisive on the inverse condemnation issue and Respondents staked their entire case on it. If Petitioners had title, they were entitled to just compensation. If the court ruled against Petitioners on the title issue, the City would have the property without paying fair market value. As stated by the City in its Brief:

> "Whether viewed as a quiet title action or an inverse condemnation action, the Claimants have a singular burden: they need to prove title." (City's Brief on the Merits, p. 36.)

Throughout, Petitioners consistently contended that their property had been taken without just compensation and that their title was supported by the overwhelming weight of existing California precedent.

The California majority, therefore, knew exactly what it had to do in order achieve a result that would

"protect" the City and its park, and, more importantly, allow the City to keep the park without paying just compensation to the rightful owners. It had to ignore its own precedents and make this case "sui generis." It had to force the square block of the result it wanted to achieve into the round hole of over a century of railroad right of law that called for a different outcome. It had to evade Petitioners' right to just compensation by rendering an opinion that would hold that Petitioners never had title in the first place. The opinion under dispute in this case is the result. Since this court has jurisdiction, it is necessary to address the merits of the instant Petition for Writ of Certiorari.

3. THE OPPOSITION BRIEF DOES NOT AND CANNOT CONTEST THAT THE CALIFORNIA MAJORITY IGNORED ITS OWN PRECEDENTS AND CALIFORNIA STATUTES IN ORDER TO ACHIEVE THE RESULT IT DESIRED IN THIS CASE.

The opposition notably does not cite a single, California Supreme Court railroad right of way case. It cites only a single California lower court right of way decision (*Basin Oil*) distinguishable because it involved a deed of land for right of way, not a deed of right of way. (See authorities cited in the Petition for Certiorari, pp. 14-16.) The author of that opinion (then Judge Stanley Mosk, now Associate Justice Mosk) dissented in the decision under dispute.

The opposition does not even discuss the overwhelming weight of decisional and statutory

authority in California that was detailed in the Petition for Writ of Certiorari (see pp. 14-24) but ignored by the California majority. That majority, and the opposition, wanted a result, not a decision based on prior precedent.

4. THE OPPOSITION DOES NOT AND CANNOT CONTEST THAT THE TRIAL COURT, THE COURT OF APPEAL AND THREE JUSTICES OF THE SEVEN JUSTICE SUPREME COURT EITHER WOULD HAVE RULED, OR DID RULE, IN PETITIONERS' FAVOR BASED ON EXISTING CALIFORNIA SUPREME COURT PRECEDENT.

A total of seven judges and justices (one trial court judge, three unanimous Court of Appeal justices and three dissenting state Supreme Court justices) all thought they were bound by existing precedent when they ruled in Petitioners' favor. It is these justices who have been "bashed" in this case, not the author of the opinion under the dispute.

5. THE OPPOSITION DOES NOT DISPUTE THAT THE AUTHOR OF THE STATE COURT'S OPINION MADE REMARKS AT ORAL ARGUMENT RELEVANT TO THE ISSUE OF EVASION BEFORE THIS COURT.

Nor does the opposition dispute that Justice Arabian made remarks during oral argument that are relevant to the question of whether an intent to evade existed. Instead, the opposition itself evades the issue

with a non sequitur, i.e., the notion that this court should ignore the Constitution out of some misguided sense of solicitude toward a state justice who has retired.

Petitioners do not impugn Justice Arabian's "good" intentions. He wanted to help the City keep its park and defeat the two "heir hunters" involved in this case. Petitioners do contend, however, that those intentions, though perhaps "politically correct,"[1] were constitutionally unsound. The Constitution cannot be evaded based on "good" intentions.

Petitioners again urge this Court to order the transcript of argument to be certified. Justice Arabian said much more than a few unkind words to the two amateur hobbyist heir hunters in this case. His statements are compelling evidence that a constitutional violation has occurred in this case. Petitioners have not said more because anything more would be "bashing." This Court can decide for itself after hearing the tape of argument whether it has any relevance.

6. THIS CASE IS ABOUT CONSTITUTIONAL RIGHTS, NOT SACRED COWS.

As a parting shot, the opposition dusts off the well-known and well-worn quotation from Abraham

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[1] It is interesting that the dissent in this case (one liberal, one moderate and one conservative) all saw through their particular ideologies and followed precedent in an effort to protect private property rights against governmental intrusion. The "conservative" majority made the "politically correct" decision to help the City.

Lincoln (who first gained a degree of notoriety beyond the Illinois circuit as a railroad lawyer and litigator) to the effect that people who foment title disputes are evil.

The opposition does not and cannot dispute that the two out of 77 Petitioners who actually were heir hunters acted in a manner that was entirely legal under California law, as stated on p. 27, fn. 6 of the Petition for Writ of Certiorari. The majority opinion itself avoids any discussion of the legality of "heir hunting" and merely describes Petitioners Farquhar and Johnson, accurately, as "two hobbyist 'heir hunters.'" (Petitioners' App. A3, fn. 1.)

Petitioners, respectfully, will leave it to this Court to decide who fomented this litigation--the amateur heir hunters who found and helped the true owners, or the City and railroad who, through their "Park Acquisition Agreement," created a lawsuit that was waiting to happen.

DATED: November 1, 1996

Respectfully submitted,

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